UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

UNITED STATES OF AMERICA, Criminal No. 3:18cr00025

Plaintiff,

vs. Charlottesville, Virginia

BENJAMIN DRAKE DALEY, et al,

11:05 a.m.

Defendants. April 22, 2019

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE NORMAN K. MOON
UNITED STATES SENIOR DISTRICT JUDGE

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Proceedings recorded by mechanical stenography; transcript produced by computer.

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THE COURT: Good morning.

Call the case.

THE CLERK: Yes, Your Honor.

This is Criminal Action No. 3:18cr25, United States of America vs. Benjamin Drake Daley, Michael Paul Miselis, and Thomas Walter Gillen.

THE COURT: Government ready?

MR. LUGAR: Yes, Your Honor.

THE COURT: Defendants ready?

MS. LORISH: Yes, Your Honor.

MR. HEBLICH: Yes, Your Honor.

MR. COX: Yes, Your Honor.

MR. EUSTIS: Yes, Your Honor.

THE COURT: Who is going to argue first for the defendants?

MS. LORISH: Good morning, Your Honor.

THE COURT: Good morning.

MS. LORISH: I'm going to have some initial words and then counsel for Mr. Gillen will also have a few things to say, and possibly also counsel for Mr. Miselis. Thank you.

Lisa Lorish on behalf of Mr. Daley.

Mr. Daley and his co-defendants traveled from California to Virginia with the intent to attend the Unite the Right rally. This was a lawfully permitted event. Although it was certain to be controversial and draw

counter-protestors, it was not advertised as a riot in either the generic or statutory sense. A court -- this court, in fact -- reviewed the plans for that rally in advance and allowed it to proceed as planned.

A lawful protest that turns confrontational, and the federal government responds by indicting people under an Anti-Riot Act. Challenges follow under the First Amendment. That describes what happened at the inauguration of President Trump. The United States Attorneys office for the District of Columbia responded by charging more than 200 protesters under the D.C. Riot Act. Almost all of those cases were later dismissed. It also describes the present case. If we watch the headlines, it will no doubt describe what happens in South Dakota where the legislature there just passed an anti-riot bill last month in response to protests over the Keystone xl pipeline.

Of course, we're here today on these defendants' motion to dismiss the indictment for failing to state a claim. As the Court knows, the parties have exchanged voluminous briefs in advance, and I'm not going to repeat those arguments all for you today.

Mr. Daley has made two fundamental challenges to the indictment. First, that neither count was pled adequately. And second, that the Anti-Riot Act is unconstitutional on its face because of its overbreadth, its vagueness, and its

infringement on protected First Amendment rights. Central to both of these arguments is the definition of riot. It's a definition the indictment omits entirely. There is no factual allegations that describe the riot that is central to what the government has alleged, and, at best, the indictment simply alleges Mr. Daley and his co-defendants traveled here expecting violence may occur and that some violence did occur. While the government wants this case to be about violence --

THE COURT: The government will have to prove it. It's not what they want or anything. The government has to prove their intent, doesn't it?

MS. LORISH: They have to prove intent under the statute -- that there was an intent to travel, an intent to commit, at some point, some overt act. And the way the indictment is pled, they haven't specified, with respect to any of these defendants -- they've specified that it was travel versus other use of commercial means, but they haven't specified if there was a riot, if this was an attempted riot. They haven't specified if they traveled with the intent to promote a riot, to actually engage in a riot, to incite a riot. Because of the overbreadth of the statute and the fact that they haven't specified, there's two problems. One, how it's pled; and two, no matter how it's pled, it's facially overbroad and comes up against protected First Amendment

rights.

The government's response in its brief so far has been to say this isn't about First Amendment speech, it's not about protected activities -- it's about violence. But violence is just one small way this Act can cover what happens at a riot or at an alleged riot. You only have to travel with the requisite intent for the statute to be brought, and you can travel with the requisite intent to just promote, to encourage, to aid and abet others in promoting and encouraging. So that's why the government's typical response in this case -- that it's just about violence -- is inadequate.

I'm going to invite up my co-counsel to address some issues with respect to overbreadth and anything else that counsel for Mr. Gillen would like to bring up.

Thank you.

MR. EUSTIS: Thank you, Your Honor. May it please the Court.

I'd like to address a couple of aspects specifically of the due process or notice issue that we see and as that relates to overbreadth, so it washes back a little bit between the Riot Act and the indictment itself.

The government, in its response, under Holder and under Hoffman Estates, places a great deal of emphasis on the distinction between an on-the-face or facial challenge to

constitutionality and an as applied challenge. The argument is made that, essentially -- and the government is correct in that a facial challenge asks the question whether a statute is impermissibly vague in all of its applications. In such a challenge, facial challenge, if the defendant's conduct -- this is cited primarily by the government -- if a defendant's conduct is clearly described, then the defendant cannot challenge the statute as void for other hypothetical individuals or hypothetical cases. We think this goes to the very heart of one of the many problems with the Riot Act and with the statute, and that is, specifically, here, when the indictment, as in this case, does not notify us, specifically, of the conduct that we engaged in that is allegedly prescribed, we are then, even under the government's argument, at once free to make hypothetical arguments and raise hypothetical scenarios, and we're also extremely limited in our ability to raise an as applied challenge because we have extraordinarily little -- extraordinarily few specific allegations that go to the intent that Your Honor raised that the government would have to prove.

Under the Dellinger case -- that's a Seventh Circuit 1972 -- and I'll return to this in just a few moments -- the defendants were specifically charged with making certain speeches for the purpose of inciting, promoting, and

encouraging a riot after having traveled in interstate commerce with intent to do so. This is the reason -- that's from Dellinger. This is the reason we have the -- must have statutory language in an indictment -- this is under Hamling, as cited in the briefs -- that indicates the indictment must be accompanied, other than just statutory language, with such a statement of facts and circumstances as will inform the accused of the specific offenses or offense for which he is charged. So I want to take a couple minutes, Judge, and just look at the indictment before the Court in terms of specific allegations.

The first six paragraphs allege membership in Rise Above Missouri, and some description of that, though not very much. Then there are allegations, again, in the first six paragraphs that the members hold racist nationalist and anti-Semitic viewpoints. The government may argue that, allegedly, that could undergird shared viewpoints supporting a conspiracy, but in terms of what these defendants did, it doesn't tell us very much. Certainly, beliefs cannot violate the Riot Act.

THE COURT: When you get down to paragraph nine under Count 1, that starts telling you what they are accused of doing.

MR. EUSTIS: Yes; I wouldn't disagree with that, Judge. Absolutely.

After the first six, we have the statutory language. Then we have the allegation that they rented a van in California to drive north to Berkeley, California. Then next, they purchased flight tickets to Charlottesville from California, and they did, in fact, fly from California to Charlottesville. Then we have they bought athletic tape and baseball helmets in Albemarle County on August 11th, I believe. Then the allegation that on August 12, one or more of them did wrap their hands in athletic tape.

Now, the Court does not have evidence before it, as has been pointed out -- just the indictment. But since it's referred to in the indictment, I feel free to say at no time on August 11 or 12 was any of these defendants wearing a baseball helmet. I don't know that they were ever observed with baseball helmets. What the government's allegation is and the evidence is, they have the point of purchase on August 11 in Albemarle --

THE COURT: That's the facts the government has to prove its case. The question is what has been alleged in the indictment, isn't it?

MR. EUSTIS: Yes, it certainly is, but these are the allegations that we have -- alleged facts. To make an as applied challenge to the statute or to the indictment, we have to work off what facts we have that are alleged.

THE COURT: I thought you were telling me there was

no evidence they did something.

MR. EUSTIS: Specifically, with regard to that, no.

The indictment is correct. They did purchase baseball helmets in Albemarle County, but that then becomes evidence of them of intent to riot. Meanwhile, I'm just pointing out that none of these defendants was ever seen with a baseball helmet.

THE COURT: I don't think that -- I don't know why you're bringing in the facts at this point.

MR. EUSTIS: I would agree that is outside the indictment, Judge. That's why I said I feel free to mention it, and perhaps I should not have.

THE COURT: When you get off on those tangents, it sort of weakens your argument when you bring in things that have nothing to do with the issue before the court.

MR. EUSTIS: Thank you, Your Honor.

Finally, the indictment does allege these defendants were prepared to and engaged in acts of violence and the reference is to all four named defendants. No one is specifically singled out. It's all four defendants, and the acts of violence refer to Huntington Beach, Berkeley and Charlottesville, all three. So the indictment does not allege, for instance, that Tom Gillen, individually, engaged in an act of violence, or Tom Gillen by himself or in concert with others in a particular place, whether it be Huntington

Beach, Berkeley or Charlottesville. We're not put on notice. It would be our position that not all of the defendants engaged in acts of violence in all three locations, but it is not spliced out.

Just before I make a final point, Judge, I would note that the indictment in referring to acts of violence does not say whether those acts of violence were justified or unlawful. It's not pled. Was an act of violence an assault or was it an act of self-defense or an offense of others? The indictment doesn't say. It simply says acts of violence, which ordinarily -- I shouldn't say ordinarily -- generally, is not a criminal offense.

If I may take just one moment, Judge, to contrast the facts we're given in this indictment, the allegations that are supposed to lead us to believe these defendants, or Tom Gillen in particular, caused a riot or intended to incite others to riot, where that riot occurred, if one did occur -- and we're in agreement a person does not have to actually engage in a riot, arguably, to violate the statute, but if there was one, when did it occur? What did the acts of violence result in? Did it result in a riot? If so, where and when?

Let me take a brief couple of moments, Judge, to refer to the Chicago Eight -- and this is the Dellinger case. The September 1968 grand jury -- and this is just in small

part -- alleges with regard to the Chicago Eight or Chicago Seven, as the case may be, It was further part of said conspiracy that on a certain date the defendants and other co-conspirators not named as defendants herein would make statements and speeches to assemblages of persons encouraging them to remain in and hold Lincoln Park against police efforts to clear it after permits to remain therein had been denied; to march to the international amphitheater after permits authorizing such march had been denied; to make weapons to be used against the police; to shout obscenities at, throw objects, threaten and physically assault policemen and National Guard troops; and to obstruct traffic; and damage and seize property in the city of Chicago.

One final paragraph, paragraph eight of the indictment. It was further part of said conspiracy that certain defendants would teach and demonstrate to others the use, application, and the making of an incendiary device, intending that said incendiary device would be employed to damage the underground garage at Grant Park, Chicago, Illinois, on the evening of August 29, 1968.

So that specific pleading, assaulting policemen and National Guards troops, is going to be a violation of the law. No such thing is pled in the indictment before the court. So to the extent we can raise an as applied challenge to these defendants' conduct, I'm happy to do so. We didn't

do so in the brief. It was a facial vagueness challenge, by and large, but I'm happy to make that argument now. We have a van rented, air travel, baseball helmets purchased, tape purchased and worn, attendance at four rallies, and engaged in acts of violence. That's what we're left with to make an applied challenge. The majority in Dellinger makes clear that the doctrine of overbreadth applies when a statute lends itself to a substantial number of impermissible applications such that it is capable of deterring -- such that it is capable of deterring protected conduct.

One area, specifically -- and I'll close with this, Judge -- that we have is something that may not have been contemplated by the Riot Act, and that is the so-called heckler's veto. That is a situation where there is, unlike in the Chicago Eight -- where there is a lawfully permitted rally, and the rally members, who have the permit, know, because it is pre-announced for many months, and there's even litigation over it, that there's going to be the presence of a determined adversary, and that determined adversary has engaged in violence in the past. The city of Charlottesville expressed grave concerns, including before this court, prior to August 12 that violence would be anticipated, and asked the court to take certain action as a result of that. It was heavily in the press -- all of this -- and under those circumstances, someone who wants to attend that rally and

exercise rights of assembly and rights of speech might take certain steps to protect themselves, as hundreds of people did on August 12. Without getting into too much of the facts, Judge -- body armor, shields, rifles, helmets. In this case, evidence, just on the indictment, the defendants, not in the city of Charlottesville -- in Albemarle County, two days before -- they purchased baseball helmets. That's the government's evidence. So they got a receipt. That's the baseball helmet evidence. And, of course, we have the tape and the wearing of the tape. That is what we're left with to defend against. Then, buying baseball helmets and buying tape becomes evidence of a pre-agreed intent to riot. Indeed, an intent formed somewhere --

THE COURT: It may not prove the intent, but they -- we're not dealing with proof right at this point. Is the indictment --

MR. EUSTIS: On its face, our position is it is vague and does not put us on notice as to what Mr. Gillen did in Charlottesville, Berkeley or Huntington Beach, that violated any law anywhere, other than potentially this law. And what did we do to encourage or incite others to riot? That's not pled. That's why I read the Dellinger indictment. That specifically stated what a defendant or defendants did in the indictment, and we don't have that. The strongest thing in the indictment is acts of violence. Well, as the Court

knows, self-defense can be extremely violent. Whether it was self-defense, it's our position that the state judicial system has been very effective in sorting out in particular instances of assault and batteries and this sort of thing as to whether something is just violent or a crime. They've been able to do that, and now we're placed in a position where we have a heckler's veto, and there's evidence that they took this small step and that small step, and that's then evidence on the face of the indictment, and we're supposed to defend against those allegations, without further. And it essentially doesn't charge a crime, other than the fact that, clearly, the Anti-Riot Act is a criminal offense. We would have to concede that. But looking at the indictment, it doesn't appear to charge a crime, other than vague violation of the Anti-Riot Act, which is begging the question as to what crime that is as applied to these defendants' behavior. We're not able to answer that. We're not able to respond to it, and that's why our position is the indictment is fatally flawed under noticing provisions. We need more than this.

The government may say, We've given you more facts than we need to, and I would absolutely agree with that. But they haven't given us the right ones.

Thank you, Judge.

MR. COX: May it please the Court. I'll be very

brief. I don't want to rehash the arguments of my co-counsel or briefs filed in this case, but I do want to address the word "riot." Riot was alleged in the indictment, but just that term. Riot is a word that has a public -- has a meaning that a person of average intelligence attributes to it, which is, basically, violence in a crowd. Well, the term riot has a legal meaning, and it is, you know, an element of this offense, and that term, as legally defined, is a threat or threats of commission, acts of violence by one or more persons as part of an assemblage of three or more persons.

Nowhere in the indictment is that term defined, and we believe it's absolutely necessary for that term to have been defined in the indictment and for the grand jury to have considered because this term, riot, while does have, again, a common understanding, that common understanding differs from the legal definition. So both, you know, the defendants and, indeed, the grand jury did not have that legal definition before them. So it's uncertain as to what they actually believe that term to include. So we believe for that reason --

THE COURT: Looks like the grand jury could always be ignorant of what they're doing and not know the real definition of anything.

MR. COX: Well, Your Honor, the important thing, though, is that the indictment not only fails to define that

term, but, you know, the government has argued that they just, you know, didn't recite the elements of the offense, that they alleged facts to underlie the charges in the indictment. But nowhere in their facts do they really explain what both the legal definition of riot is and how the facts that they allege pertain to that legal definition. So, you know, my client, Mr. Miselis -- he's not really under notice, you know, that a riot occurred and when it occurred. All he's under notice is that he's alleged to have committed violence or incited violence at some point during those two days in Charlottesville. So he's not really received any notice at all as to what the riot was, when it occurred and so on. So we believe that was necessary in the indictment to give him notice.

Thank you, Your Honor.

THE COURT: Thank you.

MS. LORISH: Thank you, Your Honor.

So I think counsel for Mr. Miselis and Mr. Gillen have set forth the first aspect of the argument, which has to do with whether the indictment sufficiently pleads the two offenses. We would just note the majority of the argument laid out in the briefing here is just that we have a parroting of statutory language and insufficient detail, and leave it to the court to determine whether you agree with that.

I want to focus now on just over-viewing the other challenges, which are more significant, because no matter how the indictment would plead these offenses, we have the problem that the statute, the Anti-Riot act, is unconstitutional. As we've set forth in the briefing, and I won't belabor it here this morning, it's unconstitutional because of vagueness. Every application -- it doesn't have to be an as applied challenge here -- facially vague because of three things. The fact that the definition of riot that my counsel here has discussed is vague. It requires a court to assess lots of -- how clear and present is a danger and how do we know what is and isn't a riot. There's an inherent vagueness in that definition. There's the problem of attenuation, that the travel with a certain intent can happen at any point before an actual overt act happens later in the future. So that adds an additional attenuation and vagueness. And, finally, because the statute itself directly covers and criminalizes promotion, encouragement, participation in speech -- acts of speech and expression -- but at the same time tries to carve out what we don't really mean to say, advocacy of ideas or expression of belief, if it doesn't have to do with violence -- the fact there's sort of an overt attempt to carve out certain parts of speech, but it's unclear what it really means, and none of it meets the Brandenburg test from the Supreme Court, which, of course,

came out after this Act was passed, which requires if we're going to verge on incitement, if we're going to try to criminalize speech, incitement language, you have to have intent, imminence, and likelihood. The statute doesn't require anything but intent. We have the intent part covered. We agree the statute requires the defendant to have the requisite intent. But there's nothing that requires an imminence of violence. Somebody could put a handbill in the mail, as the Seventh Circuit noted in Dellinger, and that bill could argue that people should really go out and cause some violence, and the person who sent the bill in the mail may really want them to go and cause violence. But there's no imminence. We never know if anyone gets that handbill in the mail. We never know if anyone feels that the person who wrote it was intelligent and had a good argument. There's no imminence. There's no likelihood, which is related. Did the acts, did the incitement, did the speech we're talking about here -- was it likely to actually cause violence? The Anti-Riot Act does not require any of those things on its face. That's what takes it in direct contradiction with Brandenburg. Whenever we have a speech problem where we come up against speech, we have to use higher standards, which is why the overbreadth argument has an extra bite in this case. That's why the vagueness argument has to be taken all the more seriously. They're two separate arguments, to be clear,

as they've been set forth. The United States v. Williams case that's discussed at length in the reply talks about the overbreadth issue, that a statute is "facially invalid if it prohibits a substantial amount of protected speech."

That's what we have here. There are so many ways to violate the statute that have nothing to do with violence, that just have to do with speaking, without any requirement that the speaking actually be heard, be listened to, be imminent or likely, and that's what causes the overall problem in this case.

I'll just note that the Dellinger case, the one the government relies on, and, of course, we rely on it as well because it's the only case that really examines the statute in any detail, and it's a case that's, as this Court knows, over 40 years old. That case read its way around this problem in a way that I have suggested this court cannot follow. The way the Seventh Circuit got around the problem in this statute is to say overt act doesn't mean overt act. It means a completed act. So when the statute says whoever travels in interstate commerce to incite a riot and then actually takes an overt act towards inciting a riot, that means they actually did it. They didn't just take some small step. They actually incited the riot or they actually promoted the riot.

THE COURT: An overt act doesn't necessarily mean the

riot --

MS. LORISH: I'm sorry, Your Honor?

THE COURT: An overt act would not necessarily mean the riot occurred.

MS. LORISH: That's right, and that's where the problem is. The Seventh Circuit found other ways to overturn all the convictions in that case without having to find this act unconstitutional. But the reason it said it could find it --

THE COURT: In this particular case, the indictment charges that they made the plans -- they had the intent in California, and amongst the three of them, they conspired. But they were not going to do anything illegal until they got to Charlottesville, and that's when they would encourage and so forth the riot.

MS. LORISH: Right. But the problem with the statute, Your Honor, as we suggested, is that the statute criminalizes -- yes, having the intent to travel, so in this case, that would be the intent formed in California to travel to Charlottesville. Then it criminalizes not just the intent but any overt act towards one of the four listed things.

THE COURT: But there would be no particular time gap between the inspiring of the riot and the riot. The allegation is not that they inspired the riot when they were in California. I think separation for the riot is to occur

when they get to Emancipation Park or the rotunda or whatever.

MS. LORISH: I think that is a possible set of facts the government could try to prove at the trial, Your Honor, but --

THE COURT: Isn't it in the allegation?

MS. LORISH: Well, Your Honor -- I have a copy of the indictment here.

So with respect to the conspiracy --

THE COURT: With respect to other people, they were not going to do anything -- the speech would come at the riot or at the gathering, which was to become the riot.

MS. LORISH: Well -- so, first, with respect to the law, Your Honor, this is a facial challenge. The specific facts of when the travel happened versus the speech in this case don't implicate whether the statute is overbroad because the statute doesn't require that someone say, I'm going to travel today and then go make a speech tonight. It could be that you traveled six months before you ever make a speech. We see some of the attenuation problem even in the specific facts pled in this indictment because the conspiracy is alleged to have started back in March, six months before we ever get to August. We're talking about events and things that they said and did in the six months leading up to the supposed riot.

With respect to Your Honor's question about, well, it's about -- it was only when they got to Charlottesville that they incited the riot -- this indictment doesn't tell us, Your Honor, if they're accused of inciting a riot. We just have a copy of the language in both paragraphs nine, with respect to the conspiracy, and then, again, in paragraph 13. All four options from the statute are included. They're accused of having taken some overt act towards either inciting a riot, or organizing, promoting, encouraging, participating in, or committing an act of violence in furtherance, or aiding and abetting any person in inciting or participating, which goes back to what the other counsel were suggesting with respect to the difficulty in inferring what the government has actually alleged here. If they had done a simple indictment that says they're charged with traveling with the intent to incite a riot and then they got to Charlottesville and incited a riot, we would at least know the aspect of the constitutional challenge we'd be making in an as applied challenge at this point. But because it's been pled under the entire statute, that is part of why we're making the facial overbreadth challenge and the facial vagueness challenge at this time.

If there's no further questions from the Court at this time, I'll let the government respond.

THE COURT: All right.

MR. LUGAR: Good morning, Your Honor. May it please the Court. Justin Lugar for the United States.

Your Honor, just by way of introduction, we all know we're here today not because these defendants came to Charlottesville to peacefully demonstrate or express their views nonviolently. These defendants are here because they came to Charlottesville to, in their own words, "smash Commies," and because they openly bragged they were the only Alt Right crew that could actually "beat Antifa senseless and wins rallies." These defendants never sought to win hearts and minds through the peaceful protected speech and actions. Their own words and violent actions led them to where they sit today.

We can all agree -- I think we all do agree that the First Amendment is essential to our constitutional foundations, but it's not without its limits. Defendants here blow past these limits, and that's the sort of abhorrent conduct the Anti-Riot Act prohibits. Since they cannot, on the facts of this case, prevail, they challenge the constitutionality of the Act and claim the indictment is insufficient. Each of these challenges fails, however.

First, the indictment is sufficient. You've heard the defendant say today it just put them on notice. That's the legal standard. It must put them on notice. They complain about definitions and the listing of the elements,

but that's all that's required by law.

Second, the Act does not violate the First Amendment and is not overbroad in any way. The statutory language tells us so and every court to ever address this issue has found the Act to pass constitutional muster, and I'll get into those particular statutory provisions in just a minute.

Thirdly, the Act is not vague under the Fifth Amendment due process clause either. There is a host of defined terms in the statutory scheme, and defendants like their insufficiency argument -- they just don't like the definitions so they claim they're vague. If the defendants were right, then virtually every criminal statute would be deemed vague under their defined terms.

So I want to jump straight into the sufficiency of the indictment, which I think sort of colors the entirety of the defense's argument here. It's important to note first that what the defendants are asking this court to do is to rewrite a fundamental foundational principle of criminal law and procedure to include definitions in every indictment. That's just wrong. The indictment need only put the defendants on notice of the charges against them. An indictment need not set out legal definitions to be sufficient, and we know that from the case in Hamling. There, the Supreme Court found that the definition of obscene, which may have a common meaning, as the defendants

say, and may have a legal meaning, that need not be included in an indictment. The same is true for riot and the other defined terms in this statutory scheme. In fact, there's nothing unique about this indictment as opposed to any other indictment this court deals with that include defined terms through the statutory scheme that are not pled in the indictment. For instance, the definition of controlled substance for cases under the Controlled Substance Act; the definition of firearm or destructive device under 922. The same is true for the definition of sexually explicit conduct for child exploitation cases. Those are all terms of art that may have a common meaning as well, but they're not required to be pled in an indictment, and the Supreme Court has made that very clear.

I also want to point out just briefly that in their reply, the defense points to the case of Kingrea and Hooker. I just want to clear up any misunderstanding about what that case -- those cases may stand for. The way the defendants argue that case is to say that if you fail to plead this definitional part in the indictment, which we contend and what the Supreme Court has told us is not required, then you can't subsequently charge a conspiracy and fail to outline those essential elements of the underlying offense. So, really, it's inapplicable here.

If you look at the indictment itself, paragraph 13

pleads all the elements of the substantive offense violating the Anti-Riot Act, and then the conspiracy charge at both paragraph nine and at paragraph ten lists the elements of the conspiracy, the elements of riot, and then it goes through the overt acts that we've alleged in furtherance of that conspiracy. So we'd submit the indictment itself is sufficient on its face and what, really, the defendants are seeking here is they want more facts. They want a Bill of Particulars. They have a procedural mechanism to get the specificity that they so desire. They have not asked for it. They've been provided with a wealth of discovery in this case that outlines precisely the events that give rise to this indictment. So we contend that that's not really a serious grounds to challenge the indictment.

Moving on to the more substantive issues, I'll look first at the First Amendment. As the defendants have said, their First Amendment challenge is an overbreadth challenge, which basically contends that the Anti-Riot Act substantially burdens protected speech. I would point out there are two initial problems with their challenge. First, the Act doesn't itself burden any protected speech at all and defendants can't point to a single hypothetical example of the statute burdening protected speech. The defendants want this court to focus on the events in Charlottesville as a political rally, hence their desire to get you to take

judicial notice of the permit allegations and what Judge Conrad found in a related case. They do that because defendants here traveled to turn that supposed rally into a riot, not because they accidentally stumbled into a peaceful demonstration -- I'm sorry -- into a riot. We submit it's important to bear in mind that the Anti-Riot Act does not criminalize or burden in any way at all peaceful expressions of one's view, whether they're mainstream views, whether they're considered Alt Right views, far left views, or regardless of whether they're just patently abhorrent views that not many people would agree with.

Second, there's a real irony in the defendants' argument and its reply that the government asks this court to be the first court in 45 years to uphold the constitutionality of this Act under an overbroad standard. I think Ms. Lorish mentioned it as well in her closing statements there, but we'd submit the very fact the Anti-Riot Act is so rarely employed by the United States that it evidences it's not overbroad, because the hallmark of overbreadth, from a constitutional standpoint, is that you have arbitrary enforcement and standardless application of law. Thus, one would expect to see the exact opposite of what we see here, which is a narrow and rare use of the specific statute. We've been fortunate in our history since the Vietnam era not to really have to deal with these sorts

of issues until at least in August of 2017 here in Charlottesville. So while the defendants try to paint their behavior and speech as protected and some high ideals under the First Amendment, they can't escape the fact that the First Amendment does not immunize one from criminal prosecution where you engage in unprotected speech or expression, and that's exactly what is alleged here and the Anti-Riot Act prohibits.

I point out the defendants really don't dig much into the test at all or give much analysis of it. So as the Court is aware, to invalidate a statute on First Amendment grounds, you have to show that it's protected speech and that if the speech is protected, the burden on that speech must be substantial. Here, we contend that the speech at issue is not even protected speech, much less burdened or even substantially burdened. We know this because the statute tells us so.

I point the Court to Section 2102(b) where it specifically excludes from the coverage of the statute "the mere oral or written advocacy of ideas, or expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts." If that statutory definition, that carve-out, if you will, was not explicit enough, we know that every court to ever deal with this issue has uniformly found

the statute does not cover protected speech at all.

In the Foran case, the court said Section 2101 does not proscribe the peaceful exercise of the right of free speech and assembly, only those acts that tend to the incitement of violence that's imminent and likely. Dellinger told us the same thing. Intentional incitement of violence is not protected speech. Again, in the Northern District of California case, the Shead case, court there tells us that the Anti-Riot Act is limited to the advocacy of the use of force or of law violation where that advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action.

Since the defendants can't legitimately argue the statute burdens protected speech, they instead claim the statute is overbroad and that the travel does not need to be linked in time to the riot. That's their, sort of, attenuation line. We submit this is a red herring.

First, the plain language and the structure of the statute illustrate that there must be a connection between the use of interstate commerce with the intent, and the overt act with the intent. If the language were not explicit enough from the statute, we must bear in mind that there's nothing unique about the statute and in general principles of criminal law, intent must be connected to the overt act, and you alluded to it in some of your questioning earlier, Your

Honor. The court in Dellinger was right in stating that whether you call it a clear and present danger test or call it an imminent likelihood of violence, the nature and details of the riot contemplated at the time don't have to be exactly identical to those acts that give rise later. All you have to do is have unlawful intent and the prohibited conduct coincide at some point. And this is true for every criminal statute. Intent must correspond with action, and what's what we've alleged in this indictment and what the Anti-Riot Act actually requires.

So it's not really a matter of constitutional overbreadth just because it happened in the First Amendment context. But it's a question for a jury to determine. Was the intent linked to the overt acts that we alleged? That's an issue in nearly every single criminal case, and there's nothing new here to look at.

Your Honor, the defendants also argue the Anti-Riot Act is vague under the due process clause. Whether the court views this as a facial challenge or an as applied challenge, it really doesn't change the outcome because the Act is not vague.

If the Court desires, I'm happy to go through the Holder analysis and explain why, but I think that's clear from the statute itself. I think the most important thing for the Court is to look at the test for vagueness. That

test says that conviction fails to comport with due process only if the statute under which it obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or when something that is so standardless that it authorizes or encourages seriously discriminatory enforcement.

Here, we're not talking about statutory terms that lack definitions. They're all specifically defined in 2102. We're not talking about terms that require untethered subjective judgments without statutory definitions, narrowing in context or set of legal meanings. Here, we have statutory definitions of the terms at issue: riot, to incite a riot, and to organize, promote, encourage or participate in and carry on a riot. In carefully defining these terms, Congress did precisely what the due process clause requires. It provided the sort of narrowing in context envisioned in the Williams case, which defendants mentioned as well, and what the court envisioned, and it relies upon a set of legal meanings and legal terms of art to define the boundaries of the statutory scheme. So since they can't really counter this conclusion, in their reply, the defendants focus in on clear and present danger test and they claim that the Anti-Riot Act is vague because of the language relying on clear and present danger. But the court in Dellinger was very clear that the court's analysis of the definition of

riot and its reference to clear and present danger recognize exactly what the Anti-Riot Act requires vis-à-vis action, and can be expressed in many different ways with many different terms, all of which convey an intelligible and objective meaning, which is all that due process requires.

So some of the different ways the Dellinger court explained that this test has been characterized -- it's been called the clear and present danger test. It's been called a test that is directed to inciting and likely to incite imminent lawless action. They look at whether the harm sought by an expression is immediate and instantaneous and irremediable except by punishing that expression and currying the conduct. And they look at whether the expression is inseparably locked with the action. So there can be little doubt that reference to clear and present danger and the definition of the Riot Act reflects congressional purpose in providing just the sort of narrowing context required under the due process test.

Just briefly -- this didn't come up today, but just for purposes of the brief, I want to briefly address the defendants' reliance on recent cases from the Supreme Court that found terms to be vague. That's the Johnson case and the Dimaya case, as I'm sure this Court is very familiar with. I just want to point out that what the majority, and Justice Scalia, recognized in Johnson is that what was wrong

with those statutes was that it required an abstract comparison between a hypothetical ordinary case as opposed to analysis of real world facts and statutory elements, and that created this sort of indeterminacy or vagueness that failed to give ordinary folks notice, and resulted in arbitrary enforcement. What's important and what's left out of the defendants' argument is the fact that the majority also noted that as a general matter, we don't doubt the constitutionality of the laws that call for the application of a qualitative standard such as substantial risk to real world conduct. The law is full of instances where a man's fate depends on his estimating right some matter of degree.

What I would submit to the Court, Your Honor, is the Anti-Riot Act and its statutory definitions that we've discussed at length here today, and in our briefs, do not invite, much less compel, this sort of judicially-imagined ordinary case. The Anti-Riot Act is a law that calls for the application of a qualitative standard whether it's described as speech that presents clear and present danger or speech that is directed to incite and likely to incite imminent lawless actions, as explained in Dellinger. In short, the rationale of Johnson and then, subsequently, Dimaya actually support a finding that this statute, the Anti-Riot Act, is not vague and is the opposite of vague.

So we've sort of come full circle, here, Your Honor.

The defendants' actions here fall far outside the bounds of the First Amendment and they fall squarely within the confines of the Anti-Riot Act, and that's for a jury to determine whether or not the government can prove those elements. They've been sufficiently pled.

And I want to be clear about what the defendants are really asking this court to do in their motion. First, they're asking this court to rewrite the fundamental principle of criminal pleading, to require all defined terms of statutory schemes to be pled in an indictment. We know that's just not the case from Hamling and from a host of other issues this court deals with every day.

Second, they ask the court to find incitement to violence and violence itself to be protected under the First Amendment, and that's in spite a century of case law to the contrary.

Third, they ask the court to find vagueness in the statute where the defendant simply doesn't like the congressionally-defined terms. They're defined and they put ordinary people on notice and I don't think that there's any argument there that if you were to require that, every single statute that has a term of art would have to be pled in the indictment and wouldn't pass the constitutional test for vagueness.

Finally, if that weren't enough -- and we didn't

address this today. I think the Court is fully aware of this situation. But they ask the court to reexamine and then overturn, basically, a century of commerce clause jurisprudence, which I think they, wisely, didn't argue that here today. But for all those reasons, Your Honor, we believe the Anti-Riot Act is more than constitutional under a First Amendment standard and a due process standard, and the indictment gives -- I mean, it gives incredible detail compared to many indictments. If they want a Bill of Particulars, they could have asked for one.

Unless the Court has any specific questions --

THE COURT: No questions. Thank you.

MR. LUGER: Thank you.

MS. LORISH: Just to be clear for the record, the very clear, easy-to-understand definition that would be apparent to any person the government has no problem with -- the definition of riot set forth in 18 U.S.C. 2102 -- that's "a public disturbance involving either an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or results in, damage or injury to the property of any other person or to the person of any other individual; or a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or

collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts of violence would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person or to the person of any other individuals."

The government's suggestion that we should take heart that the statute is not so overbroad, it's not a problem because it's rarely used -- I find to be unconvincing. Overbreadth can go a selective prosecution in the rare case as much as it could in the common case. The fact that we haven't seen prosecutions under this statute raises concerns. It doesn't suggest and promote the idea that we should just take heart that the government will only use it when they really need to. This is all covered extensively in the briefing.

So the last thing I'll mention for today, Your Honor, is that we focused a lot on travel with intent, and that's because that's the only thing that's clearly pled about this statute, frankly, in the indictment. We know the government has alleged these individuals traveled with the intent. They did not use the alternative in the statute, which was that they could have been alleged to have used any facility of interstate commerce, including but not limited to the mail, telegraph, telephone, radio or television. But for this

overbreadth challenge, which is a facial one -- for this vagueness challenge, which is a facial one -- that second part of subsection A is just as relevant, because my colleague is correct. We have to look at whether there's a chilling effect from the statute. Is the burden worth it? When you include a statute that makes it a federal felony offense to use the internet, to use the mail, to use the radio, to promote, or to take any step towards promoting, anything that might result in a riot -- which is what we have here -- it does cover protected speech.

The government has failed to, really, address Brandenburg at all today, for good reason. Brandenburg requires immediacy. It requires a likelihood that violence actually occurred, that these words are connected directly to violent acts. The statute does not require that. I would suggest the Court should not read in a requirement that's not there because, again, this only requires an attempted overt act. You don't even have to have completed the overt act, and some of these overt acts include just aiding or abetting another person in their attempts to promote a riot. So we're so far way from an actual riot, in many instances; and, again, we could just have someone saying something on the internet and never even traveling, and that's part of the overbreadth problem for the statute.

Thank you, Your Honor.

THE COURT: Thank you. Is that all then?

I'll let you know something in a few days.

We'll recess court.

(Proceedings concluded at 12:00 p.m.)

"I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Sonia Ferris July 12, 2019"